



The Canadian Competition Bureau's New Immunity and Leniency Programs: Making Tough Decisions Even Tougher

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[Katherine L. Kay](#), [Danielle K. Royal](#), [Alexandra Urbanski](#)

- On September 27, 2018, Canada's Competition Bureau ("Bureau") released a finalized version of its revised "**Immunity and Leniency Programs under the Act**".
- The Immunity and Leniency Programs ("Programs") provide for a grant of **immunity** (a commitment by the Crown to forego prosecution) or **leniency** (a recommendation by the Crown to the court for a reduction of the sanctions to be imposed in exchange for a guilty plea).
- These grants of immunity or leniency are intended as **incentives** for parties to terminate illegal cartel and bid-rigging conduct, advise the Bureau of the conduct, and thereafter provide full cooperation to the Bureau in its investigation and to the Crown/Director of Public Prosecutions ("DPP") in any prosecution in relation to the illegal conduct.
- As discussed below, the recent changes to the Programs may respond to concerns within the Bureau and DPP about difficulties in obtaining convictions while at the same time making the decision to enter the Programs **more complex and problematic** for some potential participants.

Background

Since they were formalized in 2000 (Immunity Program) and 2010 (Leniency Program), the Programs have collectively led to multiple guilty pleas in multiple conspiracies and bid-rigging schemes, and tens of millions of dollars in fines in Canada from those participating in criminal anti-competitive conduct under the *Competition Act*. Nevertheless, and purportedly in response to some [high-profile failures](#) to secure price-fixing and bid-rigging convictions, the Bureau concluded that changes to the Programs were needed. Following two rounds of public consultations in [October 2017](#) and [May 2018](#), the Bureau made adjustments in respect of some of the more controversial proposals set out in earlier drafts, but significant concerns remain.

Any potential applicant for credit for cooperation has to do a cost-benefit/risk analysis before seeking immunity or leniency, and the revised Programs give rise to significant issues, which may well lead to a reduction in participation in the Programs.

Key Changes

Many of the changes in the Programs affect both immunity and leniency, as the steps in the processes under both Programs are similar.

Cooperation obligations

The revised Programs set out in some detail the extent of cooperation required both by the corporate immunity or leniency applicant (34^[1]) and the directors, officers, employees and agents of the applicant. (35-40)

Grant of interim immunity

One of the principal changes to the Immunity Program is that full immunity (which under the former Program could be revoked in the absence of subsequent cooperation) will now only be provided at the very end of the process. Instead, the revised Immunity Program introduces a grant of interim immunity (“GII”), which provides immunity only on a conditional basis, following which the applicant provides full cooperation — including through the end of any criminal trials of alleged co-conspirators — and only then is final immunity granted. In effect, this adds an additional step to the Canadian immunity process, in which an immunity applicant will:

1. obtain a marker;
2. make a proffer;
3. obtain a GII, which is a “conditional immunity agreement that sets out the applicant’s ongoing obligations that must be fulfilled in order for the DPP to finalize the immunity agreement” (74); and
4. only after all of its cooperation obligations are met, enter an immunity agreement.

An applicant’s failure to comply with the obligations set out in the GII may result in the revocation of the interim immunity. The Program states that the applicant will be given notice that the DPP intends to revoke its immunity and given a minimum of 14 days to remedy its failure. (102, 107)

In the Bureau’s words, the purpose of adding the GII to the process is to “facilitate the Bureau’s investigation by formalizing the legal framework within which an applicant will disclose records and make witnesses available.” (73) During the public consultations, concerns were expressed about the risks to an applicant in disclosing all information before knowing that it will be fully protected by a grant of immunity; those concerns are not addressed in the finalized Program. When considering whether to seek immunity in Canada, the absence of complete protection prior to providing full cooperation may well change the cost-benefit analysis for a potential immunity applicant.

Coverage for directors, officers and employees

The revised Programs address coverage for directors, officers and employees (“Individuals”) of a corporate immunity or leniency applicant.

Under the revised Immunity Program, a GII may be made available to a business organization or to an individual. (70) Corporate immunity under a GII will extend to all identified current Individuals who:

- Admit their knowledge of or participation in an offence under the Act as part of the corporate admission; and
- Cooperate in a “complete, timely and ongoing manner”. (79)

The revised Immunity Program specifies that Individuals to be covered under the immunity must be identified by the corporate applicant, and will not be automatically included. Individuals will be covered

under the final grant of immunity if they have “upheld the requirements of the Program”. (104) Coverage under the Immunity Program for former Individuals or “identified agents” will be “considered for inclusion on a case by case basis.” (79) Cooperating Individuals will not automatically lose their immunity in the event that the corporation’s immunity is revoked (and vice versa). (108)

Under the Leniency Program, current identified Individuals of the first-in leniency applicant will be immunized from criminal prosecution provided that (as with the Immunity Program) they admit knowledge of or participation in the unlawful conduct and cooperate fully. (145-51) Individuals of subsequent Leniency Program applicants (second-in and subsequent) “may be charged depending on their role in the offence”; in making a recommendation to the DPP regarding the laying of charges or the penalty to be imposed (fine and/or custodial sentence) for Individuals of leniency applicants, “the Bureau will consider all of the available facts and circumstances in respect of such an individual’s participation in the offence.” (152-53)

Recording of evidence

The Bureau has confirmed that it will continue to permit applicants to use a paperless process when providing proffers. (43) However, under the revised Immunity Program, applicants can expect “that sworn audio-video recorded interviews will be taken at an advanced stage of the investigation in order to support recommendations to the DPP”. (92) Under the revised Leniency Program, prior to making a recommendation to the DPP about leniency and the laying of charges against Individuals, the Bureau “ordinarily will seek to schedule and conduct interviews with key witnesses” (in the case of the first-in leniency applicant), and “a key witness” (for the subsequent leniency applicants); those interviews “may be taken under oath and video recorded”. (167-70)

During the consultation process, significant concerns were expressed about the potential prejudice to immunity and leniency applicants arising from the making of audio-video recordings, including in the form of discovery demands for production of the recordings in follow-on civil litigation in Canada and elsewhere. The change to refer to “advanced stage” (which is not defined) in the Immunity Program does not address the concerns, and in any event the Leniency Program contemplates interviews very early in the process. These concerns will factor into the cost-benefit analysis for potential immunity and leniency applicants.

Leniency Program credit

The Leniency Program historically has provided for a 50% fine reduction for the first leniency applicant as well as immunity from prosecution for current Individuals, with a fine reduction of 30% for the next in the leniency queue, and unspecified reductions for those coming subsequently. Under the new Leniency Program, every leniency applicant is potentially eligible for a leniency cooperation credit (“LCC”) of up to 50% to be applied to the base fine. (139) The amount of the LCC depends on the degree to which the applicant’s cooperation enhances the Bureau’s investigation and ability to pursue other culpable parties, and takes into account the following factors:

- Timing of the leniency application (relative to other parties in the cartel, as well as relative to the stage of the Bureau’s investigation);^[2]
- Timeliness of disclosure;
- Availability, credibility and reliability of witnesses;
- Relevance and materiality of the applicant’s records; and
- Any other factor relevant to the development of the Bureau’s investigation into the matter, or any additional matter for which the party is eligible for “immunity plus.”^[3]

These revisions to the Leniency Program give rise to the prospect of “leapfrogging” ahead of other leniency applicants who made the decision to cooperate and self-report more quickly than a subsequent

applicant whose cooperation is “better”. There is much room for uncertainty of outcome and for negotiation in respect of the LCC to be provided.

Additional credit for corporate compliance programs

In addition to the LCC, which can reduce the fine that an applicant may otherwise face for committing a criminal offence under the Act, the revised Leniency Program provides an additional credit for having a compliance program. Where the Bureau is satisfied that a corporation had a “credible and effective” corporate compliance program in place at the time the offence occurred, when making its recommendation to the DPP the Bureau will treat the compliance program as a mitigating factor resulting in an unspecified reduction of the base fine.^[4]

The Bottom Line

The decision as to whether a corporation or individual should seek immunity or leniency is always a difficult one, made on imperfect information and subject to time, cost, corporate culture, international consistency and other considerations. The revisions to the Programs may assist the Bureau and the DPP with its investigations and prosecutions, but at the risk of reduced participation in the Programs given the enhanced uncertainty and potential for prejudice arising from the revisions. It may be that the Bureau’s reach has exceeded its grasp in making these changes to what have been highly successful programs.

This post has been adapted from a section of our publication “Canadian Competition and Foreign Investment Outlook 2019”, which is available [here](#).

[1] Numbers in parentheses refer to paragraphs in the Programs.

[2] The timing of the leniency application is referred to as “an important factor related to cooperation”, and may be the one that the Bureau values above the other factors which, by contrast, are referred to as “relevant factors” (see para. 140).

[3] A leniency applicant may be eligible for “immunity plus” status when it discloses evidence of conduct constituting a further criminal offence under the Act unknown to the Bureau. If that leniency applicant meets the requirements set out in the Immunity Program regarding the newly-disclosed offence, the Bureau will recommend that the DPP grant the applicant immunity from prosecution with respect to the newly-disclosed offence (see paras. 141-42).

[4] Mitigating factors apply to both corporations and individuals. The net effect of mitigating factors will be estimated as a percentage of the base fine (see paras. 136-38).

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